NOT TO BUILD: *CITY OF BOISE V. FRAZIER* FURTHER RESTRICTS LOCAL GOVERNMENTS' ABILITY TO FINANCE PUBLIC PROJECTS

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I. INTRODUCTION

As a result of the recent Idaho Supreme Court ruling in *City of Boise v. Frazier*,[1] municipal governments and political subdivisions in Idaho are facing

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1. 143 Idaho 1, 137 P.3d 388 (2006).

significant limitations on their ability to finance facilities and equipment. Since the inception of Idaho's statehood, article VIII, section 3 of the Idaho Constitution[2] has limited the ability of counties, cities, boards of education, school districts, and other subdivisions of the State of Idaho to incur indebtedness or liabilities[3] without (i) a vote of two-thirds of the qualified electors, and (ii) an annual tax sufficient to pay principal and interest on such debt as it becomes due.[4] The difficulty in achieving a two-thirds majority vote has made article VIII, section 3's "proviso clause," as it has been termed, the saving grace for many projects heretofore financed and constructed. The proviso clause, included in article VIII, section 3 after substantial debate at the Constitutional Conven-

2. IDAHO CONST. art. VIII, § 3 reads as follows:

> Limitations on county and municipal indebtedness—No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two-thirds (2/3) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district.

3. See Michael C. Moore, *Constitutional Debt Limitations on Local Government in Idaho—Article 8, Section 3, Idaho Constitution*, 17 IDAHO L. REV. 55 (1980), for a discussion of what is included in the definition of "indebtedness" and "liability." For the purposes of this article, all references to "debt" or "indebtedness" include reference to liabilities.

4. IDAHO CONST. art. VIII, § 3.

tion of Idaho,[5] provides an exception from the requirements of article VIII, section 3 for "ordinary and necessary expenses authorized by the general laws of the state."[6] Consequently, if an expense is deemed to be ordinary and necessary, a vote of the general electorate and the identification of a tax for repayment is *not* necessary for the debt to be incurred. Prior to the *Frazier* decision, the Idaho Supreme Court's interpretation of "ordinary and necessary expenses" had become fairly well-defined to include repair of existing facilities, as well as construction of new facilities if the project was related to a facility that had been maintained by the municipality on a long-term basis and that facility had become obsolete or created public safety concerns.[7] However, in *Frazier*, the Idaho Supreme Court breathed new life into its somewhat forgotten 1897 holding that "necessity for making the expenditure at or during such year" is required for an expense to be ordinary and necessary.[8]

The ordinary and necessary exception to article VIII, section 3 is especially important for municipalities and political subdivisions in Idaho because of the lack of—but for achieving the ever-daunting two-thirds majority vote—methods for incurring indebtedness. Unlike many other state supreme courts, the Idaho Supreme Court has rejected the "special fund" doctrine, which has been summarized by the Idaho Supreme Court as a holding that "a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed."[9] The special fund doctrine would allow municipalities to issue "revenue bonds," meaning bonds or other indebtedness secured and paid solely by revenue generated by the financed facility, without holding an election and levying a tax to repay the obligations, as would otherwise be required by article

5. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 584, 584–95 (I. W. Hart ed., 1912) [hereinafter PROCEEDINGS] (debating the adoption of article VIII, section 3).

6. IDAHO CONST. art. VIII, § 3.

7. *See* 21 Op. Idaho Att'y Gen. 98, 100 (1988) *and* Asson v. City of Burley, 105 Idaho 432, 441–42, 670 P.2d 839, 848–49 (1983) (summarizing the case law on the ordinary and necessary exception prior to *Frazier*). *See also* City of Pocatello v. Peterson, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970) (holding that construction of a new airport terminal was ordinary, and thus necessary, because the airport was an ongoing municipal obligation, was obsolete, and "ceased to provide the necessary safety demanded by air travelers"); Bd. of County Comm'rs of Twin Falls County v. Idaho Health Facilities Auth., 96 Idaho 498, 510, 531 P.2d 588, 600 (1974) (holding that improvements to an existing facility to comply with safety code were ordinary and necessary).

8. City of Boise v. Frazier, 143 Idaho 1, *4, 137 P.3d 388, 391 (2006) (quoting Dunbar v. Bd. of Comm'rs of Canyon County, 5 Idaho 407, 412, 49 P. 409, 411 (1897)).

9. *Asson*, 105 Idaho at 438, 670 P.2d at 845; *see also* Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912). For further discussion of the special fund doctrine, see Moore, *supra* note 3, at 59–66, and Michael C. Moore, *The Idaho Constitution and Local Governments—Selected Topics*, 31 IDAHO L. REV. 417, 455–56 (1995).

VIII, section 3.[10] Article VIII, section 3 has been amended numerous times,[11] to add certain limited "special fund" concepts by permitting, for certain entities for certain projects, the ability to incur indebtedness secured by something other than a dedicated tax; however, incurring such indebtedness still requires a vote.[12] Additionally, a complete exception from the requirements of article VIII, section 3 exists for port districts and entities issuing indebtedness to finance industrial development.[13]

In addition to Idaho municipalities' inability to incur revenue debt without an election, Idaho is one of the few states without a supreme court decision holding that annually appropriated leases are not debt as defined by article VIII, section 3. In *Williams v. City of Emmett*, the decision most closely on point, the Idaho Supreme Court held that a multi-year lease, which was not subject to annual appropriation, violated article VIII, section 3.[14] Interestingly, the Idaho Supreme Court had the opportunity to review the annual appropriation lease concept in *Lind v. Rockland School District.*[15] However, the court declined to do so, stating "the issue is not ripe for review."[16] Despite the lack of an Idaho Supreme Court case on point, many municipalities have entered into annually appropriated leases, with options to purchase, for equipment and capital improvements. However, as a result of the apparent signal in the *Frazier* case that the Idaho Supreme Court will construe debt avoidance techniques narrowly, many banks and financing institutions have stopped offering this financing option.[17]

10. *See* Moore, *supra* note 3, at 60 (citations omitted).

11. Article VIII, section 3 was amended six times between 1950 and 1976. See *Asson*, 105 Idaho at 439, 670 P.2d at 846, for a discussion of the individual amendments. *See also* IDAHO CONST. art VIII, § 3 (compiler's notes) (2004).

12. See *supra* note 2 for the exceptions to article VIII, section 3 that allow incurrence of indebtedness without the requirement for provision of a tax for repayment. Article VIII, section 3 provides that "revenue bonds," which do not require a tax to provide for repayment, can be issued based on a *majority* vote for water systems, sewage collection systems, water treatment plants, sewage treatment plants, and to rehabilitate existing electrical generating facilities. Article VIII, section 3A provides for "revenue bonds" based on a *majority* vote for counties to finance pollution control equipment and facilities. IDAHO CONST. art. VIII, § 3.

13. See *supra* note 2 for the exception included in article VIII, section 3 for port districts. The exception specifically allows issuance of revenue bonds *without* a vote or the securing of a tax. Additionally, article VIII, section 3B provides that port districts can issue revenue bonds "for non-governmental entities" *without* a vote. Article VIII, section 5 allows for the issuance of "revenue bonds" by public corporations created by cities or counties to finance industrial development facilities on behalf of non-governmental entitles *without* a vote, as well. IDAHO CONST. art. VIII, §§ 3B, 5.

14. 51 Idaho 500, 506–07, 6 P.2d 475, 477–78 (1931). In *Williams*, the City of Emmett had entered into a multi-year lease for a street sprinkler. The supreme court held that such leases violated article VIII, section 3, stating: "The recent extensive development of payment on the installment plan has taxed the ingenuity of man to invent a shift whereby municipalities may circumvent this constitutional requirement in public financing." *Id*. at 505, 6 P.2d at 476.

15. 120 Idaho 928, 821 P.2d 983 (1991).

16. *Id.* at 932, 821 P.2d at 987.

17. *See* Lora Volkert & Brad Carlson, *Banks Say 'No' to Public Agencies*, IDAHO BUS. REV., Oct. 30, 2006, at 1A. For further discussion on how municipalities were able to secure annual appropriation lease financing without an Idaho Supreme Court case and how the *Frazier* decision has impacted this financing mechanism, see *infra* Part IV.D.

This article will provide background on the adoption of the ordinary and necessary exception to article VIII, section 3 of the Idaho Constitution, along with a summary of the Idaho Supreme Court's interpretation thereof prior to *Frazier*. It will then analyze the Idaho Supreme Court's decision in *Frazier*, including a discussion of why the court chose to return to a more narrow view of the proviso clause and other routes the court could have taken to reach the same outcome. Finally, the article will address where the *Frazier* decision leaves local governments faced with capital needs.

II. THE PROVISO CLAUSE IN ARTICLE VIII, SECTION 3 AND THE STATE OF THE LAW ON THE PROVISO CLAUSE PRIOR TO *FRAZIER*

A. The Proviso Clause in Article VIII, Section 3

Article VIII, section 3 of the Idaho Constitution, in its original form,[18] was intended by the framers to be a strict limitation on municipalities' ability to incur permanent or extraordinary indebtedness.[19] Based on article 11, section 18 of the California Constitution,[20] the framers of the Idaho Constitution believed in the necessity of the restriction on debt and liabilities was fueled by their awareness of the financial ruin of municipalities around the West that had incurred significant indebtedness in an effort to aid private enterprise and had been left to pay the bill when those enterprises failed.[21] In discussing a proposed exception to article VIII, section 3 for ordinary expenses, the delegates at the Idaho Constitutional Convention focused on the need for counties and other municipalities to be able to incur indebtedness if necessary to pay court fees and other costs that were out of their control, including emergencies, such as floods.[22] A number of variations were proposed to provide an exception to arti-

18. As adopted in 1889, article VIII, section 3 concluded after the proviso clause. *See supra* note 2.

19. *See* PROCEEDINGS, *supra* note 5, at 588, 590.

20. CAL. CONST. art. 11, § 18 (repealed 1970).

21. *See* Moore, *supra* note 3, at 57 (citations omitted).

22. *See* PROCEEDINGS, *supra* note 5, at 587–89, 592. Some delegates felt that even a limited exception to article VIII, section 3 was inappropriate because it would deprive article VIII, section 3 of its ability to limit indebtedness. Compare the remarks of Delegate Batten at the Idaho Constitutional Convention:

> If we are going to restrict any state or municipal indebtedness, let's restrict it. Let's not do as did Rip Van Winkle when he made a resolution not to drink anything—keep on drinking and say each drink did not count. Now we are here in this article dealing with municipal and state indebtedness, dealing with it with a view to restrict it within certain bounds. Now the object of this proviso would eat the whole life out of the matter, deprive it of its very meaning, so that I am for that reason opposed to it. There are ample provisions made for meeting every objection which is urged against it, and that is if two-thirds

cle VIII, section 3.[23] The original proposal made was to exclude all "ordinary indebtedness,"[24] which would likely have made the proviso clause much broader despite the framers' focus on a narrow list of costs, such as court costs. Another proposed exception was limited to "necessary court expenses" rather than the ordinary and necessary expenses that ultimately became the proviso clause.[25] In selecting "ordinary and necessary," the framers were clearly choosing to require the expense to be both ordinary *and* necessary because an exclusion for "ordinary indebtedness" was proposed and rejected.[26] This desire to further limit the proviso clause fits with the delegation's intent that capital projects, such as bridges and roads, were intended to be subject to the requirements of article VIII, section 3.[27]

B. Early Interpretations of Ordinary and Necessary

Early Idaho Supreme Court and federal district court decisions reflect the framers' restrictive view of "ordinary and necessary expenses."[28] With the exception of *Jones v. Power County*, in which the Idaho Supreme Court held that construction of a jail in a newly-established county was an ordinary and necessary expense,[29] the decisions consistently reflected that new construction was not ordinary and necessary, therefore requiring a vote and a tax to cover debt service prior to incurring the debt; meanwhile, repair, replacement, or maintenance of existing facilities, in addition to traditional ordinary expenses like salaries and judgments, were ordinary and necessary.[30] However, this early in-

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> of the qualified electors shall deem the emergency such as to require an additional levy, they can order an election or vote for that purpose.

Id. at 589. Other delegates countered Delegate Batten's position, arguing that requiring an election for ordinary expenses in the basic operation of a municipality was inefficient and a waste of the municipality's funds. *Id.* at 587–89, 592.

23. *See id.* at 586–94. Proposed exceptions to article VIII, section 3 included, "ordinary indebtedness," "usual and necessary expenses," "necessary court expenses," "ordinary and necessary expenses," "usual and necessary expenses," and "general or ordinary expenses." *Id.*

24. *Id.* at 586.

25. *Id.* at 591.

26. *Id.* at 586.

27. *See id.* at 587.

28. *See, e.g.*, Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 757 (D. Idaho 1916) (holding extensive surveying of timberland to determine taxes is not ordinary and necessary); Butler v. City of Lewiston, 11 Idaho 393, 404, 83 P. 234, 238 (1905) (holding salaries of city officers and judgments are ordinary and necessary).

29. 27 Idaho 656, 663–64, 150 P. 35, 37 (1915). In *Jones*, the Idaho Supreme Court focused on the necessity of the county to begin operations and argued that it was not the framers' intent that such operations be delayed by a vote. In addition, the court relied on the limited cost of the jail, stating that no more money than was necessary was spent and there were no contentions that the facility was extravagant. *Id.*

30. *See* 21 Op. Idaho Att'y Gen. 3 (1988); *see also* Thomas v. Glindeman, 33 Idaho 394, 394, 195 P. 92, 92 (1921) (holding street maintenance and police and fire protection were ordinary and necessary); Hickey v. City of Nampa, 22 Idaho 41, 45–46, 124 P. 280, 281 (1912) (holding repair and improvement of waterworks system and fire-extinguishing equipment after a fire were ordinary and necessary); Woodard v. City of Grangeville, 13 Idaho 652, 661, 92 P. 840, 842 (1907) (holding purchase

terpretation of ordinary and necessary was expanded by subsequent supreme court opinions.

C. The Evolution of Ordinary

The definition of "ordinary" used in numerous cases originated in a federal district court case, *Dexter Horton Trust & Savings Bank v. Clearwater County*.[31] In *Dexter*, the court held that "[a]n expense is ordinary if it is in an ordinary class, if in the ordinary course of the transaction of municipal business, or the maintenance of municipal property, it may and is likely to become necessary."[32] In addition, the Idaho Supreme Court, in *Hickey v. City of Nampa*, held that to be ordinary and necessary an expense did not need to occur frequently.[33] The findings in *Dexter* and *Hickey* aligned nicely with the framers' desire that the exception would cover only day-to-day expenses, such as court costs, and emergency expenditures.[34] In *City of Pocatello v. Peterson*, the Idaho Supreme Court was asked to determine whether a new terminal at the Pocatello Airport, which had been owned and operated by the City of Pocatello since 1947 and had been determined to be inadequate and unsafe, was an ordinary and necessary expense.[35] In reaching its conclusion that the new terminal was ordinary and necessary, the Court opted to offer a new definition of ordinary.[36] "Ordinary" was redefined as: "regular; usual; normal; common;

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of water system was not ordinary and necessary); McNutt v. Lemhi County, 12 Idaho 63, 72–73, 84 P. 1054, 1058 (1906) (holding construction of a wagon road required a vote and provision for a tax); Dunbar v. Bd. of Comm'rs of Canyon County, 5 Idaho 407, 407, 49 P. 409, 411 (1897) (holding construction of a bridge and scalp bounties were not ordinary and necessary); Bannock County v. C. Bunting & Co., 4 Idaho 156, 169–70, 37 P. 277, 280–81 (1894) (holding cost of temporary jail was ordinary and necessary but the purchase of land for courthouse site was not ordinary and necessary).

31. *See* 235 F. at 752. The definition of ordinary originating in *Dexter* was adopted by the Idaho Supreme Court in *Thomas*. 33 Idaho at 394, 195 P. at 93.

32. 235 F. at 752. In addition to this definition, the *Dexter* Court focused on the substantial cost of the expenditure in comparison to the county budget in determining that it was not ordinary. *See id*. at 756–57. Similarly, in *Jones*, the Court focused on the limited cost of the new jail as part of its reasoning for finding it ordinary and necessary. *See supra* note 29 and accompanying text.

In *Dexter*, the Court went on to find that if something is ordinary, it is likely to be necessary. This circular definition of "necessary," which basically only requires the expense to be ordinary, is clearly not aligned with the framers' intent and is implicitly rejected in *Frazier*, with the return to the *Dunbar* "urgency" standard for an expense to be necessary. *See* infra notes 38–40 and accompanying text; City of Boise v. Frazier, 143 Idaho 1, *7, 137 P.3d 388, 394 (2006).

33. *See* 22 Idaho at 45–46, 124 P. at 281. The Idaho Supreme Court went on to state:

> It is one of the incidents of the ownership of property that it must be kept in repair; and any casualty that may happen must be repaired if the property is to be useful and serve its purpose. The making of repairs may, however, only occur at infrequent intervals and still be an *ordinary* and *necessary* expense.

Id.

34. PROCEEDINGS, *supra* note 5, at 587–88 and 592.

35. 93 Idaho 774, 778, 473 P.2d 644, 648–49 (1970).

nary.[36] "Ordinary" was redefined as: "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances."[37] Although the *Peterson* Court opted to stray from the *Dexter* definition of "ordinary," it did not appear to have a large impact on how the Idaho Supreme Court decided *Peterson* or the cases that followed—unlike the definition of "necessary" discussed below.

D. The Evolution of Necessary

Following the clear intent of the framers, once an expense has been determined to be ordinary, an analysis must be done to determine if it is also necessary.[38] In the early cases, to which *Frazier* harkens back, an expense only qualified as "necessary" if it was necessary to make the expenditure during the current year.[39] Additionally, early interpretations of necessary held that when there were less expensive temporary alternatives that could be used until the requirements of article VIII, section 3 could be met, expenses for permanent solutions were not "necessary."[40] In *Peterson*, the court again chose Black's Law Dictionary to define "necessary" as "indispensable."[41] However circular this definition is,[42] the court's change in focus from immediate necessity to just plain necessity paved the way for its decision in *Peterson* that an entirely new airport terminal was ordinary and necessary[43] and its subsequent decision in *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority* that improving the structure of the hospital in Twin Falls constituted an ordinary and necessary expense.[44] Neither *Peterson* nor *Twin Falls* included any discussion about the immediacy of the need for the project, as would have been required under the *Dunbar* interpretation of necessary.[45] Additionally, the Supreme Court in *Peterson* and *Twin Falls* did not discuss the availability of temporary solutions until the requirements of article

36. *See id*. at 778, 473 P.2d 648.

37. *Id.* (quoting BLACK'S LAW DICTIONARY 1249 (4th ed. 1968)).

38. *See supra* note 26 and accompanying text.

39. *See* Dunbar v. Bd. of Comm'rs of Canyon County, 5 Idaho 407, 412, 49 P. 409, 411 (1897); Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 754 (D. Idaho 1916) (holding that the proviso clause contemplates "present necessities").

40. *See Dunbar*, 5 Idaho at 412, 49 P. at 411; Bannock County v. C. Bunting & Co., 4 Idaho 156, 167, 37 P. 277, 280 (1894).

41. 93 Idaho at 778, 473 P.2d at 648 (quoting BLACK'S LAW DICTIONARY 1181 (4th ed. 1968)).

42. In *Frazier*, the Idaho Supreme Court pointed out the circularity of defining "necessary" as indispensable. *See* 43 Idaho at *4, 137 P.3d at 391.

43. 93 Idaho at 779, 473 P.2d at 649 (1970).

44. 96 Idaho 498, 510, 531 P.2d 588, 600 (1975). While the decision in *Peterson* certainly made the analysis in *Twin Falls* easier, it is likely that *Twin Falls* would have been decided the same way without the *Peterson* decision by using a reliance on the distinction between new construction versus repair of an existing facility and the public safety concerns demanding action. *See supra* note 30 and accompanying text.

45. *See Dunbar*, 5 Idaho at 412–13, 49 P. at 411.

VIII, section 3 could be met, another factor in determining if an expense was ordinary and necessary under the early cases.[46]

E. Controlling Case Law Prior to *Frazier*

Prior to *Frazier*, the leading case on what constituted an ordinary and necessary expense was *Asson v. City of Burley*.[47] In *Asson*, the Idaho Supreme court attempted to summarize and bring some cohesion to ninety years of case law regarding ordinary and necessary expenses, while also trying to fit the much broader *Peterson* decision into the framework the case law otherwise developed.[48] A brief discussion of *Peterson* and *Twin Falls*, the two paramount cases decided prior to *Asson* will assist in revealing the "colossal" job the *Asson* court undertook in attempting to create consistent definitions of ordinary and necessary based on prior Idaho Supreme Court decisions.

Rather than analyzing the individual requirements of ordinary and necessary, or applying the new construction versus repair and replacement distinction made in prior case law,[49] the court in *Peterson*, after providing new definitions of both ordinary and necessary,[50] considered a list of project-specific factors including: the city had operated the airport since 1947 and thus it was an ongoing municipal obligation, the terminal would be an expansion/repair to an existing facility, the facility was obsolete and inadequate to meet the needs of the public, and the current facility was unsafe for travelers.[51] In making its finding, which did not include an analysis of how the project met the definitions of ordinary and necessary, the court stated, "[i]nsuring the safety of air travel is undoubtedly a legitimate, necessary, and ordinary function to be performed by a municipality."[52] *Peterson's* significant move away from the prior methods used to analyze ordinary and necessary have left many people to posit that it was a result-oriented decision. It is interesting that the supreme court made little effort to fit the facts of *Peterson* within the confines of existing law defining ordinary and necessary.

While the consideration of a list of factors, rather than the applicability of specific definitions of ordinary and necessary, continued in *Twin Falls*, the re-

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46. *See id.*; *Bannock County*, 4 Idaho at 168, 37 P. at 280.

47. 105 Idaho 432, 670 P.2d 839 (1983).

48. *See id.* at 441–43, 670 P.2d 840–50.

49. *See supra* note 30 and accompanying text; *see also* Thomas v. Glindeman, 33 Idaho 394, 398, 195 P. 92, 93 (1921) (holding that repair and maintenance are ordinary and necessary expenses). This distinction was renewed and approved by the supreme court in *Asson*. *See* 105 Idaho at 441–42, 670 P.2d at 848.

50. *Peterson*, 93 Idaho at 778, 473 P.2d at 648 (quoting BLACK'S LAW DICTIONARY 1181, 1249 (4th ed. 1968)).

51. *See id.*

52. *Id*.

pair of an existing hospital facility with documented safety issues would likely have fit within the definitions of ordinary and necessary established prior to *Peterson*.[53] The factors considered by the court included: it was an existing hospital facility, repairs were needed to comply with state safety requirements, the importance of existing hospitals within the state, and the disadvantage of having even a portion of one of those hospitals become inoperable.[54] With the *Twin Falls* decision fitting more closely with prior decisions on ordinary and necessary, *Peterson* was left sitting out on its own, making the task in *Asson* all the more difficult.[55]

In *Asson*, the Idaho Supreme Court provided a detailed description of the state of the law relating to ordinary and necessary expenses, concluding with and giving credence to the list of the factors detailed in *Peterson*, focusing specifically on the necessity to upkeep and maintain the city's asset, and the public safety concerns.[56] The Idaho Supreme Court also endorsed the distinction between new construction and repair and maintenance as a way to determine whether an expense was ordinary and necessary, reiterating the distinction as "*new* construction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities."[57] However, rather than using the new construction versus repair distinction or the factors considered in *Peterson* or *Twin Falls* to examine the public power project at issue, the court, using the definition of ordinary from *Peterson* and the reasoning from *Dexter*,[58] although not relying on *Dexter* for authority, found that the meaning of "ordinary" could not be stretched to include the "colossal" size of the obligations the project would place on the cities involved.[59] Thus, the Idaho Supreme Court left the ordinary and necessary analysis with a mix of the traditional standards and the list of factors originated in *Peterson*, which seemed to

53. *See supra* notes 32, 39, 49 and accompanying text.

54. *See* Bd. of County Comm'nrs of Twin Falls County v. Idaho Health Facilities Auth., 96 Idaho 498, 510, 531 P.2d 588, 600 (1974). In *Twin Falls*, the court ultimately held that, "[i]t is certainly an ordinary and necessary undertaking to keep existing hospitals operational and in good repair." *Id.*

55. *See supra* notes 32, 39, 49 and accompanying text.

56. *See* Asson v. City of Burley, 105 Idaho 432, 442, 670 P.2d 839, 849 (1983). The Idaho Supreme Court's focus on "upkeep" of a city facility seemed to be an attempt to fit the case into the "repair and maintenance" line of authority, which the Idaho Supreme Court goes on to acknowledge as good law. *See id.* Additionally, the focus on safety concerns seemed to give the project some of the urgency that would make it a necessary project under the *Dunbar* test, although the Idaho Supreme Court did not include a discussion of the same in their analysis. What the Idaho Supreme Court seemed to be ignoring in trying to fit *Peterson* within the confines of the existing case law is that a new terminal was likely not required to upkeep the airport, and the safety issues likely could have been resolved with a little repair and maintenance.

57. *Id.* at 441–42, 670 P.2d at 848–49.

58. *See supra* note 32 and accompanying text. In the finding in *Asson*, the court focused on the size of the project and the open-ended obligations of the cities, similar to the comparison of the size of the indebtedness to the county budget in *Dexter*. *See Asson*, 105 Idaho at 443, 670 P.2d at 850.

59. *Asson*, 105 Idaho at 443, 670 P.2d at 850.

lend themselves to a broader interpretation of the proviso clause, and a renewed focus on a more limited view of the definition of "ordinary."

III. *CITY OF BOISE V. FRAZIER*

A. Introduction

In *Frazier*, the Idaho Supreme Court reined in what had arguably become a fairly expansive view of the ordinary and necessary exception to article VIII, section 3. In doing so, the court moved away from the list of factors used to analyze the projects in *Peterson* and *Twin Falls*, and acknowledged in *Asson*, and instead analyzed the *Frazier* facts based on the definitions of ordinary and necessary established circa 1900.[60] Applying those turn-of-the-century standards, the supreme court held that while the project was ordinary, it was not necessary because it was not urgent.[61]

B. Facts

In 2004, the City of Boise sought a judicial confirmation[62] that construction of a new five-level parking structure on the site of an existing parking lot, to be connected to another parking structure at the Boise Airport, was an ordinary and necessary expense exempt from the requirements in article VIII, section 3.[63] The city owns and has operated the airport since 1926, which serves as the primary airport for southwest Idaho and eastern Oregon.[64] Use of the airport is expected to increase substantially in the near future.[65] Appellant, David Frazier, filed notice of appearance and opposition in the city's judicial confirmation proceeding.[66] After the hearing was held,[67] the district court granted the city's

60. *See* Dunbar v. Bd. of Comm'rs of Canyon County, 5 Idaho 407, 409, 49 P. 409, 411 (1897); Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 752 (D. Idaho 1916).

61. *See* City of Boise v. Frazier, 143 Idaho at *7, 137 P.3d at 394. In discussing why it was not urgent, the court stated that it was an expense that the city had known was coming and could plan for and hold an election. In addition, there was an alternative available. *See id.*

62. Judicial confirmation is an in rem proceeding, which allows a political subdivision to seek "[a]n early judicial examination into and determination of the validity of the power of any political subdivision to issue bonds or obligations and execute any agreements or security instruments therefor promotes the health, safety and welfare of the people of the state." IDAHO CODE ANN. § 7-1302(1) (2004). Judicial confirmation provides a method for local governments to have a judicial determination made about whether an expenditure is ordinary and necessary prior to the expense being incurred.

63. *Frazier*, 143 Idaho 1, *7, 137 P.3d, 388, 394.

64. *See id*. at *2, 137 P.3d at 389.

65. *See id.*

66. *See id*. The judicial confirmation statute provides any owner of property, taxpayer, elector or ratepayer in the political subdivision, or any person interested in the proposed issuance of bonds, the right to appear and move to dismiss or answer the petition for judicial confirmation. IDAHO CODE ANN. § 7-1307(1) (2004).

petition for judicial validation, finding that the expansion to the parking facilities at the Boise Airport was ordinary and necessary.[68] Appellant then timely filed his appeal of the district court's decision.[69]

C. A Focus on the Framers' Intent

Leaning on the conclusions of Idaho's forefathers, the Idaho Supreme Court in *Frazier* significantly narrowed the universe of ordinary and necessary expenses exempt from the requirements of article VIII, section 3 that had been either directly or inadvertently created by the court's earlier article VIII, section 3 decisions. The court in *Frazier* began its analysis with a summary of the short list of expenses that the framers identified as exempt from the requirements of article VIII, section 3.[70] It then provided the definition of ordinary as established in *Dexter*.[71] After a short discussion of the growth of the Boise Airport, the court concluded that an expansion to its parking facilities was an ordinary expense of the city.[72] The lack of analysis on whether construction of a five-story parking structure on the site of a current parking lot is an ordinary expense as defined by *Dexter* is notable. The court based its holding on the fact that Idaho law empowers municipalities to operate airports and stated that expansion of parking to meet growing demand fit within the *Dexter* standard.[73] The types of expenses previously held to be ordinary include, with exception of *Jones* and *Peterson*, county administration expenses such as salaries and repair and improvement to existing facilities.[74] Thus, the court's almost matter-of-fact holding that a new five-story parking garage, be it an expansion to the existing parking facilities or not, is ordinary is surprising in light context in consideration of prior holdings.[75]

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67. IDAHO CODE ANN. § 7-1308(1) (2004) requires the district court hold a hearing and after examination of all relevant matters make appropriate findings and render a judgment and decree.

68. *See Frazier*, 143 Idaho at *2, 137 P.3d at 389.

69. *See id.* Any party, whether or not directly involved in the district court proceedings, may appeal the district court's finding in a judicial confirmation within 42 days of the ruling. IDAHO CODE ANN. § 7-1309 (2004).

70. *See Frazier*, 143 Idaho at *2, 137 P.3d at 389–90; *see also supra* note 22 and accompanying text.

71. *See id*. at *4, 137 P.3d at 391 (quoting Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968)); *see also supra* note 32 and accompanying text. Interestingly, while the *Frazier* court specifically rejects the definition of necessary used in *Peterson* and then takes time to distinguish its holding from *Peterson*, it neglects to mention the definition of ordinary outlined therein. *See* 143 Idaho at *4, 137 P.3d at 391. This apathy indicates the Idaho Supreme Court determined that *Peterson*'s revised definition of ordinary had no impact on the state of the law.

72. *See Frazier*, 143 Idaho at *4, 137 P.3d at 391.

73. *See id.*

74. *See supra* notes 30, 32–33.

75. See *infra* note 83 for a discussion of the Idaho Supreme Court's inclusion of the repair versus new construction standard as a factor in the necessary determination, rather than as part of the ordinary analysis.

Moving on to the definition of necessary, the Idaho Supreme Court dismissed the definition of necessary used in *Peterson*,[76] stating "such a definition does not assist a court in distinguishing truly necessary expenditures from those that are merely desirable or convenient."[77] The court then revived the *Dunbar* test, which requires "a necessity for *making the expenditure at or during such year*,"[78] arguing that use of the *Dunbar* urgency standard aligned the law with the framers' intent.[79] Citing prior decisions, the court stated that expenses to provide temporary solutions were ordinary and necessary, but expenses to provide permanent solutions should be subject to a vote of the people, even if such requirement causes crude and inefficient administration of local government.[80]

Applying the renewed standard to the facts of *Frazier*, the court conceded the importance of adequate parking to the airport and the importance of the airport to Boise's economy.[81] However, the court held that the need for additional parking was not an emergency as required by *Dunbar*, and in fact a temporary solution of shuttling travelers from remote lots was available until the requirements of article VIII, section 3 could be met.[82]

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76. *See supra* note 41 and accompanying text.

77. *Frazier*, 143 Idaho at *4, 137 P.3d at 391.

78. *Id.* (quoting Dunbar v. Bd. Of Comm'rs of Canyon County, 5 Idaho 407, 412, 49 P. 409, 411 (1897) (emphasis added in *Frazier*)); see *infra* note 83 for a discussion of whether the court slightly loosened the urgency standard in trying to align its holding in *Frazier* with prior decisions and how the urgency standard has been interpreted by the Idaho Attorney General's office.

79. *See Frazier*, 143 Idaho at *4, 137 P.3d at 390 (citing PROCEEDINGS, *supra* note 5, at 590–92); *see supra* notes 22–27 and accompanying text.

80. *See Frazier*, 143 Idaho at *5, 137 P.3d at 392 (citing Bannock County v. C. Bunting & Co., 4 Idaho 156, 167, 37 P.2d 277, 280 (1894) and Williams v. City of Emmett, 51 Idaho 500, 505, 6 P.2d 475, 476 (1931) (quoting Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 754 (D. Idaho 1916))). In *Dexter*, the federal district court in the District of Idaho captured the intent of the framers with this eloquent discussion, which has been cited countless times:

> The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a pay-as-you-go system of finance. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay. Such policy entails a measure of crudity and inefficiency in local government, but doubtless the men who drafted the Constitution, having in mind disastrous examples of optimism and extravagance on the part of public officials, thought best to sacrifice a measure of efficiency for a degree of safety. The careful, thrifty citizen sometimes gets along with a crude instrumentality until he is able to purchase and pay for something better. And likewise, under the Constitution, county officers must use the means they have for making fair and equitable assessments until they are able to pay for something more efficient, or obtain the consent of those in whose interests they are supposed to act.

235 F. at 754.

81. 143 Idaho at *5, 137 P.3d at 392.

82. *See id.*

D. Careful Attention to Distinguishing

In returning the meaning of the proviso clause to what the framers intended, the Idaho Supreme Court was careful not to disturb its previous decisions and in that process it may have backed off the "urgency" standard slightly.[83] The court took time to specifically distinguish *Frazier* from both *Peterson* and *Twin Falls*, implicitly relying first on the safety and public health implications of the projects to create the requisite urgency missing from *Frazier*.[84] Additionally, recognizing that repair and improvement expenses are ordinary and necessary, the court distinguished *Frazier* stating that converting a parking lot to a five-story structure was "so profound" an improvement that it must be considered new construction.[85] Thus, although the court attempted to recognize and approve the repair versus new construction distinction and the prior cases decided on that basis, it narrowed the scope of repair by holding that

83. *See id.* at *4–6, 137 P.3d at 391–93. Providing a laundry list of prior decisions, the court stated that such decisions were "broadly consistent" with the *Dunbar* test. *Id*. at *4, 137 P.3d at 391. Interestingly, included in the court's list of cases is *Jones*, which held that building a jail in a newly established county was ordinary and necessary. *See supra* note 29 and accompanying text. Despite the arguments made in *Jones*, its holding is arguably not "broadly consistent" with *Dunbar* and *Bunting* because likely some temporary provision could have been made to house prisoners until a vote of the people could be held.

It is up for debate whether the urgency standard reinvigorated by *Frazier* is loosened through the Idaho Supreme Court's discussion regarding repair and improvement of existing facilities in its attempt to align its holding with prior decisions. *See id*. at *6, 137 P.3d at 393. In that discussion the court seemed to hold that repair and maintenance expenses are ordinary and necessary expenses, stating "the logic holding that repair and improvement of existing facilities can qualify as an ordinary and necessary expense, while sound, simply cannot be extended so far as to cover the circumstances of this case." *Id*. Additionally, in its conclusion, the court lists "the need for repairs, maintenance, or preservation of existing property" as a possible cause for the required urgency to meet the necessary standard, which seems to give credence to the court's belief that repair and replacement is both ordinary and necessary. *Id*. at *7, 137 P.3d at 393–94. However, in examining the definitions of ordinary and necessary as provided in *Dexter* and *Dunbar*, repair and maintenance of an existing facility really goes to the definition of ordinary, because a facility could need repair and maintenance, which would be an ordinary expense, but that does not necessarily mean that the repair and maintenance is urgent, as the *Dunbar* definition of necessary requires. In a letter addressed to Idaho Senator Broadsword, the Office of the Attorney General identifies similar questions about the interpretation of the *Frazier* decision. Letter from Carl E. Olsson, Deputy Att'y Gen., to the Honorable Joyce Broadsword, Senator (October 19, 2006) (on file with author). In the letter, two views of the *Frazier* holding are described, with the first requiring an unforeseen emergency for an expense to be necessary and the other requiring instead that there be no reasonable alternatives for an expense to be necessary. *See id.* This analysis fits with the above discussion, as the Attorney General's first view of the holding would require true urgency, which could never be achieved for a foreseen expense, whereas the second view would allow for repair and maintenance of existing facilities where there were not reasonable alternatives. At the conclusion, the Deputy Attorney General who authored the opinion stated that he believed the less restrictive view was appropriate because it fit more with the prior cases, citing *Board of County Comm'rs of Twin Falls v. Idaho Health Facilities Auth.*, 96 Idaho 498, 531 P.2d 588 (1974).

84. *See* 143 Idaho at *6, 137 P.3d at 393.

85. *Id*. The fact that the project is new construction seems more relevant to the definition of ordinary. *See supra* notes 75, 83.

the parking project, which was referred to throughout the opinion as an expansion, was "too profound" to be ordinary and necessary.[86]

E. Not a "Bad Facts Equals Bad Law" Decision

Frazier is clearly not a result-oriented decision. Finding that a new parking garage for the Boise Airport was not ordinary and necessary by applying the law as summarized in *Asson* would have been quite simple. Using the *Peterson* definition of "necessary" as "indispensable," the court could have reasoned that an additional parking garage was not indispensable to the Boise Airport, at least at the current juncture.[87] Or using the long-standing distinction between new construction and repair versus improvement of current facilities, a well-reasoned holding could have been made that the brand new, five-story parking garage was new construction, and thus not ordinary and necessary.[88] The Idaho Supreme Court clearly made a specific decision to use *Frazier* as an opportunity to realign the law created by some of its earlier decisions concerning what constitutes an ordinary and necessary expenditure to more clearly adhere to the framers' intent as evidenced by the proceedings and debates of the constitutional convention. *Frazier* has received much criticism and has been dubbed a typical case of "bad facts make bad law." However, it seems what proponents of publicly financed projects may consider "bad law" was not created as a result of *Frazier*, but as a result of a fiscally conservative group of constitutional delegates.[89] The questions that remain are where does the decision in *Frazier* leave municipalities who relied on the law as summarized by *Asson* to finance their hospitals, jails, airports, police cars and fire trucks, and were the framers right in so stringently limiting municipalities ability to incur indebtedness?

IV. IMPLICATIONS OF *FRAZIER*

The question of whether the framers were right in their decision to strictly limit the ability of municipalities to incur indebtedness is beyond the scope of this article, and is a political question the Idaho Legislature—and ultimately the Idaho electorate if the Idaho Legislature so determines—will undoubtedly be faced with in evaluating constitutional amendments to article VIII, section 3 that would loosen the financing restrictions given new life by *Frazier*. The following section will address how the Idaho Supreme Court's return to the framers' restrictive approach on what debt can be incurred without a vote impacts

86. *Id*.
87. *See supra* note 41 and accompanying text.
88. *See* Asson v. City of Burley, 105 Idaho 432, 442, 670 P.2d 839, 849. *See also supra* notes 30, 49, 73–75 and accompanying text.
89. *See supra* notes 22–27 and accompanying text.

municipalities. Prior to *Frazier*, a municipality or political subdivision had four generally available options for incurring indebtedness that it believed fit within the proviso clause of article VIII, section 3: (i) hold an election pursuant to article VIII, section 3 for approval of the expenditure and make provisions for the collection of a tax sufficient to cover debt service,[90] (ii) engage qualified legal counsel to render an "unqualified" opinion that the expense was ordinary and necessary, (iii) seek judicial confirmation that the expense was ordinary and necessary, or (iv) lease the needed equipment or real property pursuant to an annually renewable lease. The following is a discussion of how the decision in *Frazier* appears to be affecting each of the above options, if at all, along with background on each option.

A. Hold An Election and Establish a Tax to Repay Indebtedness

The ability of a municipality or political subdivision to hold an election is not impacted by the *Frazier* decision. Due to the narrowing of the ordinary and necessary exception in *Frazier*, many more municipalities will likely opt to hold elections to approve proposed indebtedness. While the framers casually referenced holding an election, and some of them suggested requiring an election for incurrence of any indebtedness,[91] elections are time-consuming,[92] costly to hold[93] and more costly to win, especially when a two-thirds majority is required.[94] Additionally, "revenue" bonds are generally not allowable pursuant to article VIII, section 3, and thus a tax must be established to repay the proposed indebtedness.[95] Thus, entities such as hospitals that intend to repay the indebtedness with revenues of the facility must attempt to communicate to voters the intention to use revenues to reduce the tax levy, so that the election is more likely to achieve the necessary two-thirds vote, despite the fact that the election

90. The Idaho Constitution provides exceptions from the requirement to establish a tax to cover debt service for certain types of projects, as well as very limited modifications and exceptions to the voting requirement of article VIII, section 3. See *supra* note 2 for the full text of article VIII, section 3. *See also supra* notes 12, 13.

91. *See* PROCEEDINGS, *supra* note 5, at 589. *See also supra* note 22.

92. Recent legislation limits the ability of municipalities and political subdivisions, except school districts, to hold bond elections on only four dates each year. IDAHO CODE ANN. § 34-106 (2001).

93. See IDAHO CODE ANN. §§ 34-1401 to -1410 (2001) for notice and other requirements of an election held pursuant to the Uniform District Election Law. The Uniform District Election Law is not applicable to municipalities, but it provides an outline of the general requirements for holding an election. *Id*. § 34-1401.

94. A two-thirds majority vote is required for all municipalities and political subdivisions, unless specifically exempted from article VIII, section 3. See *supra* note 12 for a listing of projects that require only majority approval to comply with article VIII, section 3. Issuance of revenue bonds by port districts and public corporations for industrial development facilities are exempt from the requirements of article VIII, section 3 entirely. *See supra* note 13. See also Ameritel Inns, Inc. v. Greater Boise Auditorium District, 141 Idaho 849, 855, 119 P.3d 624, 630 (2005), for the supreme court's holding that public funds cannot be expended to influence an election to approve indebtedness. This inability to campaign makes winning an election all the more difficult.

95. *See supra* notes 9–12.

question itself may need to provide for establishment of a tax to repay such indebtedness.

B. Secure an Unqualified Bond Opinion

In conjunction with the incurrence of municipal debt, most lenders and underwriters require an "unqualified" opinion of an attorney trained in the area of municipal finance, often referred to as "bond counsel." The standard required for issuance of an unqualified opinion is that the attorney should be firmly convinced that the jurisdiction's highest court would reach the same conclusion.[96] The best basis for issuance of an unqualified opinion on an issue of Idaho law, and the only basis upon which many firms will issue such an opinion, is an applicable Idaho Supreme Court case. Prior to *Frazier*, unqualified opinions were often rendered for expenses analyzed to fit within the confines of the law as described by *Asson*. However, post-*Frazier*, it will prove difficult to provide an unqualified opinion on projects other than a repair to an existing facility with documented safety violations, administrative expenses, something unexpected or an emergency, or a fact pattern that exactly follows something previously blessed by the supreme court. In transactions where an unqualified opinion is required, but there is no supreme court decision on point, a municipality or political subdivision may opt to have the indebtedness judicially confirmed in order to induce bond counsel to issue an unqualified opinion as described below.

C. Judicial Confirmation

In the event a municipality or political subdivision is otherwise unable to secure an unqualified bond opinion on indebtedness believed to be ordinary and necessary based on the *Frazier* analysis, such municipality or political subdivision can seek judicial confirmation that the expense is ordinary and necessary in the same manner it would have prior to *Frazier*.[97] A successful judicial validation proceeding, even if not appealed to the supreme court, is often a suffi-

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96. *See* J. FOSTER CLARK ET AL., NAT'L ASS'N OF BOND LAWYERS, MODEL BOND OPINION REPORT 7 (2003). The 2003 NABL Opinion Report provides the full standard for giving an unqualified opinion:

> Bond counsel may render an "unqualified" opinion regarding the validity and tax exemption of the bonds if it is firmly convinced (also characterized as having "a high degree of confidence") that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion. . . . For issues of state law, the relevant court is the highest court of that state.

Id. (citation omitted).

97. See IDAHO CODE ANN. §§ 7-1300 to -1313 (2004) for the statutory provisions for securing a judicial confirmation. *See also supra* note 62.

cient basis for bond counsel to render an unqualified opinion. The downside to seeking a judicial validation is that it is a time consuming and expensive process.[98] Although the judicial confirmation process was made part of Idaho law in 1988, and has been used extensively, *Frazier* was the first case in which the supreme court reviewed a judicial confirmation decision. By recognizing the power of the district court to issue a judicial confirmation, and reviewing the decision just like any other district court case, the supreme court indirectly approved the judicial confirmation process.[99] Thus, while *Frazier* potentially limits the factual situations where bond counsel will issue an unqualified opinion, it may assist municipalities in securing an unqualified opinion once an expense has been judicially confirmed.

D. Annually Appropriated Leases

The final option for municipalities and political subdivisions to meet their property and equipment needs is to lease based on an annually renewable lease. One of the most unexpected results of *Frazier* is its impact on banks' and other financial institutions' willingness to enter into annual appropriation lease-purchase transactions, which are essentially leases subject to annual appropriation with options to purchase the project for a nominal amount upon the expiration of the lease term.[100] Because there is no supreme court case holding that annual appropriation lease transactions are not debt under article VIII, section 3,[101] bond counsel have generally been unwilling to provide unqualified opinions on such transactions. However, prior to *Frazier*, financial institutions were often willing to finance equipment, and even capital improvements, using

98. The judicial confirmation process includes a number of notice and other waiting periods, including (i) a requirement of "fifteen . . . days [notice] prior to the date set for the public hearing," IDAHO CODE ANN. § 7-1304(3) (2004), in which the political subdivision will consider whether to adopt a resolution or ordinance authorizing the filing of a petition requesting judicial confirmation, which must be published "in the official newspaper, or papers of general circulation within the jurisdiction," *id*.; (ii) "fourteen days before the public hearing," the governing body must send a notice to all persons who have requested such notice, information regarding the time and place of the public hearing by certified mail, *id*.; (iii) within 14 days after the required public hearing is held, the governing body of the political subdivision may officially adopt a resolution or ordinance authorizing the filing of a petition requesting judicial confirmation, *id*.; (iv) upon filing of the petition notice must "be given to the clerk of the court," *id*. § 7-1306(2)(a), and served and "publi[shed] at least once a week for three (3) consecutive weeks by three (3) weekly insertions, in the official newspaper or papers of general circulation within the jurisdiction," by the governing body of the political subdivision, *id*.; (v) during the notice period any interested party may appear and the court may delay the hearing and extend this period of time for public response at its discretion, *id*. § 7-1307(1); (vi) after the political subdivision files its petition and the time frame for any other interested party to appear has passed, "the court shall [at its convenience] examine . . . and determine all matters and things affecting each question submitted . . . [and] make . . . findings" and render its decision, *id*. § 7-1308(1); and (vii) finally, the district court's ruling is subject to appeal by any party for forty-two days after it is entered. *Id*. § 7-1309.

99. City of Boise v. Frazier, 143 Idaho 1, *6–7, 137 P.3d 388, 393–94 (2006) (holding that these expenses were not necessary).

100. *See supra* note 17.

101. *See supra* notes 14–17 and accompanying text.

the year-to-year lease structure with a qualified opinion from bond counsel or with an opinion from the general counsel to the municipality or political subdivision.[102] With the option entering into an annual appropriation lease at least temporarily off the table, municipalities are left to lease, on a short-term basis at much greater expense than with an annual appropriation lease, or make due with outdated and inadequate equipment and facilities, until such municipality can accumulate cash to purchase the asset. This lack of options is frustrating for public officials and makes it difficult to meet the needs of the people; however it may be one of the "crude and inefficient" realities of article VIII, section 3.[103]

V. CONCLUSION

The supreme court's decision in *Frazier* has stopped many municipalities and political subdivisions in their debt-incurring tracks, and likely it was intended to do so. With the ability to incur indebtedness without compliance with the voting requirement of article VIII, section 3 now tied to a project's "urgency" to be completed during the current fiscal year, most potential projects are facing a difficult election or a long and costly judicial confirmation process. Municipalities are considering long-term solutions, including constitutional amendments, to rectify the "bad law" created by the framers and given new life by *Frazier*. Stay tuned.

102. It is hypothesized that a primary reason for the change in the attitude of banks regarding annual appropriation lease transactions based on the *Frazier* decision is that the banks were really relying on the proviso clause for compliance with article VIII, section 3, especially for equipment, which is more likely to be considered an ordinary expense. *See supra* note 17.

103. *See* Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 754 (D. Idaho 1916).